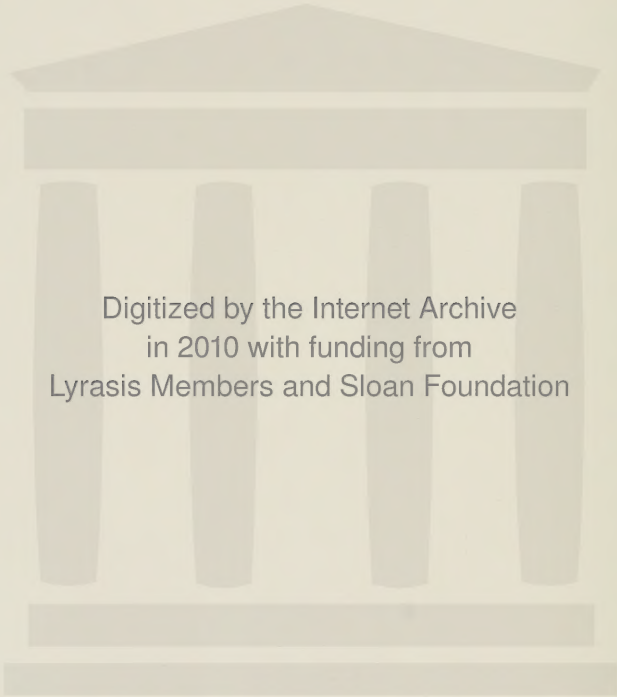
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BY THE SENATE,
FEBRUARY 19, 1872.

Read and 500 copies ordered to be printed.

By order,
A. GASSAWAY,
Secretary.

MINORITY REPORT

OF THE

Committee on Finance

TO THE

General Assembly of Maryland,

IN RELATION TO

TOLLS & CHARGES ON THE WASHINGTON BRANCH

OF THE

BALTIMORE AND OHIO R. R. COMPANY,

VERSUS

THE STATE OF MARYLAND.

ANNAPOLIS:
S. S. Mills & L. F. Colton, State Printers.
1872.

REPORT.

To the Honorable,

The General Assembly of Maryland:

GENTLEMEN:

The undersigned, a minority of the Committee on Finance, beg leave to submit the following Report upon the bill, entitled an Act to amend the Act of January Session, 1852, chapter 328, entitled "an Act relating to Tolls to be charged by the Baltimore and Ohio Railroad Company, on the Washington Branch of said road," by providing that the said Baltimore and Ohio Railroad Company shall, upon the compliance of said Company, and other parties in interest, with certain conditions set forth in this Act, be no longer bound to account for and pay into the State Treasury the proportion of the passage money received for the transportation of passengers traveling between Baltimore and Washington, heretofore claimed by the State, and to re-enact the said Act as so amended.

This bill was submitted to the Committee on Finance, as the proposition of the Baltimore and Ohio Railroad Company, made with the purpose of bringing about a settlement of the controversy in which that Company had become involved with the State.

The provisions of the bill were as follows:

1. That the maximum rate of fare of the Baltimore and Ohio Railroad Company, for conveying passengers between the cities of Baltimore and Washington, should be reduced from two dollars and fifty cents, to one dollar and twenty-five cents, and that the maximum rate for way fares should be reduced from six and a quarter cents per mile, to four cents per mile.

2. That the Baltimore and Ohio Railroad Company should be released from all obligation to pay into the Treasury of the State any portion of the passenger money received, or to be received, at any period after December 10, 1870.

3. That the separate and distinct stock of the Washington Branch Railroad, other than part thereof which belongs to the State of Maryland, should be subject to assessment and taxation in the same manner with other taxable stocks.

4. It was expressly provided that the limitations, concessions and charges, thus stated, should not take effect until the Baltimore and Ohio Railroad Company should pay into

the Treasury of the State the entire amount, which the Governor, Comptroller and Treasurer should ascertain to be the State's proportion of the moneys received by that Company for the transportation of passengers between Baltimore and Washington, to the date of December 10, 1870

At the time this bill was referred to the consideration of the Committee, the state of the controversy with the Baltimore and Ohio Railroad Company may be briefly summed up as follows:

The State had sued the Company in the Superior Court of Baltimore City, to recover the State's proportion of the passenger fares received by the Company, to January 1st, 1870.

It is understood that suits have been instituted in the same Court, to recover a like proportion of the passenger fares received to the first days of July, 1871, and of January, 1872.

The State had sued the Company in the same Court, to recover the difference between the coin and currency value of the dividends which had been paid upon the stock subscribed for by the State in the Baltimore and Ohio Railroad Company, under the Act of 1835, chapter 395.

The State, as a holder of the special stock of the Washington Branch Railroad, had filed a bill in the Circuit Court of Baltimore City, claiming to be entitled, as such stockholder, to a statement of the accounts of the Washington Branch Road, and alleging that it would appear upon a proper adjustment of the accounts of the said Branch Road, that a larger sum ought to be set apart, as the profits of the Washington Branch Road, than was exhibited in the accounts made up by the Baltimore and Ohio Railroad Company.

To the suit brought to recover the State's proportion of the capitation tax, the Company, had, in effect, pleaded that the Acts of Assembly requiring the payment into the Treasury of the State of one-fifth of the money received for the transportation of passengers between Baltimore and Washington, were, to the extent of such requirement, unconstitutional, because in conflict with the Constitution of the United States.

The Superior Court of Baltimore City held that this defense was good, and that the obligation assumed by the Company to pay to the State Treasurer one-fifth of the gross amount received from passengers upon the Washington Branch Road, was inoperative, because in conflict with the Constitution of the United States.

The Court of Appeals held the opposite doctrine, when the case was considered upon appeal, and expressly ruled

that the Acts imposing "such a tax or burden upon the Company with its consent," were constitutional and valid.—State *vs.* Baltimore and Ohio Railroad Company, 34 Maryland, pages 327–374.

The Court of Appeals, moreover, was of opinion that the validity of the law could not properly be drawn in question in the particular case, because the Company had no right of property in the fund collected for the use of the State, which it could maintain against the claim of the State.—Same case, pages 363–367.

The counsel for the State rely, in their report to the Governor, upon the cases of Furman *vs.* Nichol, 8 Wallace, 55, and Parmelee *vs.* Lawrence, 11 Wallace, 38, as showing that no right of appeal from the Court of Appeals to the Supreme Court of the United States will exist when the judgment of the Court of Appeals in favor of the State is finally rendered in conformity with the rulings of the Court of Appeals in the case reported in 34 Maryland, page 359.

The counsel for the Baltimore and Ohio Railroad Company insist, on the contrary, that the common count upon which the State sued in the Superior Court, taken in connection with the bill of particulars filed by the State, and the Acts of Assembly offered in evidence by the State, amounts in law to a special count upon the contract evidenced by the Act of Assembly; that the ruling of the Superior Court was germane and necessary; that the Court of Appeals could not properly have reversed the judgment of the Superior Court, or could not affirm any other judgment of that Court on the same pleadings, without determining the constitutionality of the laws by which this payment was exacted; and that the case of the Insurance Company *vs* The Treasurer, 11 Wallace, 208, demonstrates that the Supreme Court will entertain jurisdiction of this cause upon final appeal from the Court of Appeals of this State.

Indeed, it is not understood that any question is made as to the right of the Baltimore and Ohio Railroad Company to appeal to the Supreme Court of the United States from the judgments of the Court of Appeals to be given in the cases yet pending, brought for the recovery of the State's proportion of the passenger fares received since December 10th, 1870. For, on the day last referred to, the Company reduced its fare, and refused to collect, or receive into its Treasury, that proportionable part of its fare which was claimed by the State; and the right of the State, in such case, must, therefore, depend upon its power to enforce the Statutes now drawn in question as valid contracts between the parties.

The undersigned is not required to determine the correct-

ness of these opposite opinions, in reference to the right of appeal to the Supreme Court.

Nor is it necessary that the undersigned should, in any manner, discuss the judgment of the Court of Appeals, declaring that the Acts in question, requiring the Baltimore and Ohio Railroad Company to pay into the Treasury of the State one-fifth of the gross sums received for the transportation of passengers on the Washington Branch Road, constitute a valid exercise of power. The judgment of the Court of Appeals must stand as the law of this State until it is reversed by the Supreme Court of the United States.

But, if the undersigned has correctly understood the opinions of his fellow Senators, the question at issue, is not in fact, determined by the judgment of the Court of Appeals, even if that judgment were conclusive in law.

The purpose of the Legislature in passing the Act of 1870, chapter 476, relating to the creation and regulation of Railway Companies in the State of Maryland, was to provide a system under which corporations, formed after that date, for the purpose of constructing railways in this State, should possess equal powers and enjoy equal privileges.

The Legislature had manifested its purpose to pursue this course of liberal dealing, by granting, prior to this period, many special charters to Railroad Companies. Although largely interested in the Baltimore and Ohio Railroad Company, and in the Washington Branch of that road, it had not hesitated to incorporate the Baltimore and Potomac Railroad Company, by the Act of 1853, chapter 194, or to make that charter effective by the Acts of 1860, chapter 71, and by the Act of 1870, chapter 80; although the road, thus authorized, was in fact a route which would be, when completed, an active competition for trade and travel with the Washington Branch of the Baltimore and Ohio Railroad Company.

The undersigned is well assured that he represents the opinion of the people of this State; and he believes the judgment of the Senate, when he says that there is no wish or purpose to place the Baltimore and Ohio Railroad Company at a disadvantage, or to impose upon it conditions or burdens, not borne by other Railway Companies in this State, enjoying in all respects equal privileges and immunities.

The undersigned, therefore, assumes little, when he says that he believes it to be the judgment of this Senate, that the Baltimore and Ohio Railroad Company ought to be released from the payment into the Treasury of the State of one-fifth of the gross sum received by it for the transportation of passengers on the Washington Branch Road, whenever the Balti-

more and Potomac Railroad has completed that part of its line which extends from Baltimore to Washington.

If this be the real judgment of the Senate, the undersigned is of opinion that the case now depending between the State and the Baltimore and Ohio Railroad Company is capable of easy solution.

If the State ought, upon principles of even-handed justice, to provide for the remission of the burden now imposed upon the Washington Branch of the Baltimore and Ohio Railroad Company, upon the completion of the road now being built between Baltimore and Washington by the Baltimore and Potomac Railroad Company, that obligation is in no wise lessened or impaired by the failure of the Baltimore and Ohio RailroadCompany to comply with the terms of a contract, which the Court of Appeals has decided to be valid.

The State is incapable of temper, vengeance or partiality. Its legislation ought to be based upon correct principles, and ought not to be swayed by such feelings as litigation sometimes inspires between private disputants.

The State ought to do whatever is right, without regard to the conduct of its citizens, because when its own duty is done it has ample means of enforcing the performance by others of their obligations to itself.

In the particular case, however, no claim has been made upon the magnanimity of the Legislature. It has not been asked to release, without condition, the charge now imposed upon the Washington Branch of the Baltimore and Ohio Railroad Company, even if that charge be unjust. On the contrary, that Company, yielding for the present all consideration of its claim against the State, has offered to pay into the Treasury of the State not only the sum of money involved in the case reversed by the Court of Appeals, but also all subsequent sums claimed under the same contract to the date of December 10, 1870—a date which the Legislature may, of course, alter, if it has any good reason so to do, if the arrangement proposed could be made acceptable to its judgment with such modification.

The Company has offered to reduce its chartered rate of fare below that accorded to the Baltimore and Potomac Railroad Company.

It has offered to subject the capital stock of the Washington Branch Road to taxation in as large a manner as the stock of any railroad company in the State is subject to taxation.

The Company has not asked to be relieved from the claim of the State that the dividends payable to the State, under the Act of 1835, chapter 395, section 9, should be paid in coin.

The Company has hitherto paid these dividends in the same currency in which it has paid dividends to other stockholders, and in which it has paid the interest upon its debts and obligations, contracted before and since the passage of the Legal Tender Acts.

It has paid these dividends in the same currency in which the State has paid its interest on the currency and converted debt of the State in existence prior to the passage of the Legal Tender Acts, debts of no small magnitude, as may be seen by reference to statement "I." of the Comptroller's report for the fiscal year ending September 30, 1871.

It is to be regretted that the State has prescribed a different rule, in this particular, from that recognized as proper in the adjustment of its own affairs; but there is little reason to doubt that this claim will, at some subsequent period, be adjusted in a manner satisfactory to both parties.

The Company has not, moreover, claimed allowance, in this proposition, of the sum of money alleged to be due to it by the State, by reason of payments made in coin on account of the State to July 1st, 1865, for interest payable in England on the bonds of the State, in excess of the amount which it was legally bound to pay.

This claim of the Company rests upon the theory that it was, and is, only bound to pay in currency the dividends due upon the State's preferred stock, under the Act of 1835, chapter 395, section 9.

If the State shall be ultimately held to be entitled to recover its dividends upon its preferred stock, in *coin*, then the counter-claim of the Company will fail; but, if the State, ultimately, does not succeed in establising its right to the payment of coin dividends on its preferred stock, then the claim of the Company against the State, made in the letter to the Comptroller, dated October 4th, 1865, is unquestionably good.

These counter-claims may be left to the judgment of the Courts, and to the relief which subsequent Legislatures will doubtless afford if they are proved to be valid.

The bill, which the majority of the Committee on Finance has determined that the Senate ought not to consider, disposes, practically, of the main questions at issue between the State of Maryland and the Baltimore and Ohio Railroad Company.

It provides that the Company shall do more than the Courts can compel it to do, because it stipulates for alterations in fundamental provisions of the charter of the Company, as well as for the payment of every dollar which the State has claimed as due to the date mentioned in the bill.

It confers no other right or privilege upon the Company

than the majority of the Senate is believed to be willing to grant, if such rights and privileges are asked for by a separate bill, proposed after payment made by the Company of the very sum which this bill provides the Company shall pay, before it shall enjoy such rights and privileges.

The undersigned believes that this adjustment will be satisfactory to the people of the State.

The Finance Committee of the Senate is of the opinion that the dignity of the State is involved in the question; and that no arrangement, however satisfactory or advantageous to the State, ought to be made until the Company has paid into the Treasury of the State the sum of money which it alleges is due to the State.

Without entering upon this question, the undersigned submits to the judgment of the Senate that the considerations to which the majority of the Finance Committee has appealed have no connection with the pending discussion.

When the State of Maryland entered into that contract with the Baltimore and Ohio Railroad Company, which is embraced in the Act of 1832, chapter 175, and in the supplementary Acts, it laid down its sovereignty, and contracted only as a *corporation* with the Baltimore and Ohio Railroad Company. This is the exact scope and meaning of the judgment rendered by the Court of Appeals in 34 Md., p. 359. For, if the obligation be an *agreed* tax, as stated on page 372, *its creation was not an act of sovereignty, but of contract,* and the State has only such rights, under that contract, as are secured to it by its terms. *U. S. Bank* vs. *Planters' Bank*, 9 Wheaton, 904. *Bank of the U. S.* vs. *McKenzie*, 2 Brock, Marsh 393. 4 *Opinions Att. Gen.* 90—8 *Opinions Att. Gen.* 1.

The authorities cited amply illustrate the rule insisted upon in this report.

It seems, therefore, perfectly clear that if, in the judgment of the Senate, any part of the contract now existing between the State and the Baltimore and Ohio Railroad Company has become, or will soon become, oppressive and unreasonable, then the contract ought to be reformed, so as to adjust, by one act of settlement, all questions in dispute between the contracting parties.

This is the exact duty of those who are in charge of the interests of the State, and of the interests of the Baltimore and Ohio Railroad Company, and if this question, now so easy of solution, remains unadjusted, it will be, it is believed, matter of sincere regret to the people of this State.

HENRY WILLIAMS,
Minority of the Committee.